THE FEE TAIL IN OHIO

English Background

In 13th Century England, a conveyance to "B and the heirs of his body" created what was known as a conditional fee or fee simple conditional.[1] Landed Englishmen used the words "heirs of the body" in an attempt to keep their land passing in the family from generation to generation.[2] This attempt was singularly unsuccessful, for the English courts were quick to read into the conveyance a way in which the conditional fee could become a fee simple absolute. The courts, probably because of their interest in the free alienability of land,[3] construed the conveyance to create an estate in fee simple in the donee, subject to the condition that a child be born to the donee.[4] After the child was born, the donee could convey a fee simple absolute free from the restriction "to the heirs of his body." If the donee did not convey the land and the child died before the donee, the land reverted to the donor on the donee's death.[5] If no child were born to the donee, the condition was not met, and the land reverted to the donor on the death of the donee.[6]

This unsatisfactory interpretation by the courts resulted in the statute *de Donis Conditionalibus*,[7] now commonly known as the statute *de Donis*, in which Parliament proclaimed that a conveyance to "B and the heirs of his body" was to be construed as the donor intended. The statute abolished the courts' construction of the conditional fee by giving the heir of the donee a right to recover property alienated by his ancestor.[8] After the statute *de Donis*, a deed to "B and the heirs of his body" became known as a "fee tail," from the French *fee tailla*, i. e. an estate "carved off" from the fee.[9]

Under the statue *de Donis*, the descent of land in the family was insured so long as direct descendants survived. Or so the landholders thought, for in less than two centuries the King's courts came up with a new device to dock the fee tail. A collusive suit, known as a common recovery, was employed for the purpose of enabling the tenant in tail

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[1] For a review of the early English doctrines, see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 111-116 (4th ed. 1927); 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 16-19 (2d ed. 1903); DIGBY, HISTORY OF THE LAW OF REAL PROPERTY 187-195, 214-223 (2d ed. 1876).

[2] 1 AMERICAN LAW OF PROPERTY §1.9 (1952); HOLDSWORTH, *op. cit. supra*, note 1, at 113.

[3] POLLOCK AND MAITLAND, *op. cit. supra*, note 1, at 18.
LAND, *op. cit. supra*, note 1 at 17; 1 AMERICAN LAW OF PROPERTY §2.2 (1952).

[4] *Holdsworth, op. cit. supra*, note 1, at 113; POLLOCK AND MAITLAND, *op. cit. supra*, note 1 at 17; 1 AMERICAN LAW OF PROPERTY §2.2 (1952).

[5] *Supra*, note 4.

[6] *Supra*, note 4.

[7] 13 Edw. I, c. 1 (1285).

[8] HOLDSWORTH, *op. cit. supra*, note 1, at 114.

[9] 2 BLACKSTONE'S COMMENTARIES 112 note m; 1 AMERICAN LAW OF PROPERTY, §1.9 note 3 (1952).

to convey a fee simple.[10] In the sixteenth century a statute (32 Hen. VIII, c36) was enacted which permitted another fictitious device, the fine, to be used to convert a fee tail into a fee simple.[11] In 1834 fines and common recoverys were abolished in England by statute, and provision was made for the banning of entails by conveying the land in fee simple by deed enrolled in the Chancery Division of the High Court of Justice.[12]

The Fee Tail in America

America has found the fee tail, based as it is on landed estates and the English emphasis on inheritable position, as unsatisfactory as did the English courts. Nearly all the states have enacted legislation to control the restriction on alienation which the fee tail, literally construed, creates. This legislation falls into three general categories,[13] the largest being those states which prohibit the fee tail estate altogether. Thus in Minnesota, a conveyance to "B and the heirs of his body," passes a fee simple absolute to B.[14] Other states have enacted legislation which converts what would be an estate tail into a life estate in the first taker, with the remainder in fee simple absolute to the person or persons who would have succeeded to the estate on the death of the grantee. For example, in Illinois, B would receive an estate for life, and B's children, on B's death, would take the estate in fee simple absolute.[15] In the third category are those states which have converted the fee tail conveyance into a fee tail estate in the grantee, with a fee simple absolute passing to the issue of the grantee. Ohio[16], Connecticut[17], and Rhode Island[18] (wills only) are the only states which have adopted this method of unscrambling the common law estate tail. A few states continue the conditional fee construction adopted by the English courts in the 13th Century, refusing to recognize the statute *de Donis*[19]. The fee tail, as it existed subsequent to the statute *de Donis*, is recognized in a small group of states.[20]

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[10] Described in 1 American Law of Property §1.9 (1952), Taltarum's case, Y.B. 12 Ed. IV, 19 (1472) is sometimes said to have established this device, but other evidence indicates the common recovery was in full working order prior to that time. See Holdsworth *op. cit. supra* note 1, at 118.

[11] Walsh, History of Anglo-American Law 142 (2d ed. 1932).

[12] *Supra,* note 11.

[13] The various state statutes are compiled in 1 American Law of Property §2.13 (1952) and 1 *Restatement,* Property c. 5, Introductory Note, special notes 4-6 (1936).

[14] Minn. Stat. §§500.03, 500.04 (1945).

[15] Ill. Rev. Stat. c. 30, §5 (1947).

[16] Ohio Rev. Code §2131.08.

[17] Conn. Gen. Stat. §7083 (1949).

[18] R. I. Gen. Laws c. 566 §10 (1938).

[19] *Supra,* note 13.

[20] *Supra,* note 13.

THE OHIO STATUTE

In 1811, the Ohio General Assembly enacted the following legislation, entitled "An Act to restrict the entailment of real estate.[21]"

> That from and after the taking effect of this act no estate in fee simple, fee tail, or any lesser estate in lands or tenements, lying within this state, shall be given or granted, by deed or will to any person or persons, but such as are being, or to the immediate issue or descendents of such as are in being at the time of making such deed or will and that all estates given in tail shall be and remain an absolute estate in fee simple to the first donee in tail.

The act was borrowed[22] from Connecticut[23]. In *Pollock v. Speidel*[24], the Ohio statute was held to apply to fee tail estates created prior to 1811, so that land conveyed to "B and the heirs of his body" in 1807 passed in fee simple to the children of B when B died, sometime after 1811.

The present Ohio statute, OHIO REV. CODE, §2131.08 still appears in the middle of the rule against perpetuities, and reads as follows.

> . . . All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail . . .

WORDS CREATING A FEE TAIL IN OHIO

The typical words used to create a fee tail estate are "to B and the heirs of his body." "To B and his issue" is also a rather common method of creating such an estate.[25] In *Pollock v. Speidel*,[26] the addition of the word "assigns" in a conveyance "To B and the heirs of his body and assigns forever" did not affect the courts determination that a fee tail was created. A devise to "our son David Edwards and his heirs of nearest kin" was held to create an estate tail in *Edwards v. Edwards*.[27] A conveyance to "B and his heirs to the third generation" has also been held to create a fee tail estate.[28]

Theoretically, a conveyance to "B for life, remainder to the heirs of the body of B" should, by virtue of the rule in Shelley's case, create a fee tail estate in B[29] The Ohio Supreme Court, in dicta, has stated such a conveyance would pass a fee tail to B, and by virtue of the statute against entailment, a fee simple to the heirs of the body of B.[30] However, even before the rule in Shelley's case was abolished in Ohio,[31] the courts

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[21] 10 Ohio Laws 7. The act became effective June 1, 1812.

[22] Dungan v. Kline, 81 Ohio St. 371, 90 N.E. 938 (1910).

[23] Now CONN. GEN. STAT. §7083 (1949).

[24] 27 Ohio St. 86 (1875).

[25] 24 Ohio St. 86 (1875).

[26] 17 Ohio St. 439 (1867).

[27] 14 Ohio App. 49, 31 O.C.A. 561 (1921).

[28] Naylor v. Loomis, 9 Ohio C. C. R. 96, 6 Ohio C. C. Dec. 41 (1894).

[29] 1 SIMES, LAW OF FUTURE INTERESTS Chapter 7. (1936).

[30] King v. Beck, 12 Ohio 390 (1843), *reversed* 15 Ohio 559 (1846).

[31] The rule was abolished as to Wills in 1840, 38 Ohio Laws 126; as to deeds in 1941, 119 Ohio Laws 348.

construed such a conveyance to create a life estate in B with a remainder in fee simple to B's children.[32] The Common Pleas Court of Fayette County recently held[33] a deed "to B for life, then to the heirs of his body their heirs and assigns forever" created a fee tail in B. The court apparently did not notice any distinction between a conveyance to "B for life and then to the heirs of his body" and a conveyance to "B and the heirs of his body." The decision can be justified, since the deed was executed in 1912, prior to abolition of the rule in Shelley's case. However, its conclusion seems inconsistent with the earlier cases construing such a conveyance as a life estate and remainder, even when Shelley's rule was in force in Ohio.[34] This problem is now expressly covered by OHIO REV. CODE, §2107.49, which provides in part:

> . . . If the remainder is given to the heirs of the body of the life tenant, the conveyance shall vest an estate of life only in such first taker and a remainder in fee simple to the heirs of the body . . .

The "indefinite failure of issue" rule, developed in England,[35] has been consistently rejected in Ohio.[36] Under the indefinite failure of issue construction, a conveyance to "B and his heirs, but if he dies without issue, to C and his heirs" would pass a fee tail to B, the words "die without issue" being constructed as intending failure of issue whenever that may occur, either by death of the named person without issue or by the death of the last survivor of his issue. Under the Ohio cases, the vesting of the fee in the above example would be determined at the death of B.[37]

The fee tail has always been restricted to real property in Ohio.[38] The Courts have varied in their definitions of the "presumption against entailed estates" which is said to exist in any construction problem. It has been said that:

> Estates tail . . . are not favored in this country.
> The presumption is against the intention to create them, and that presumption must be overcome by language entirely free from amibiguity.[39]

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[32] King v. Beck, 15 Ohio 559 (1846); Dix v. Benzler 32 Ohio L. Abs. 599 (1940).

[33] Hoppes v. American National Red Cross 128 N.E. 2d 2851 (1955).

[34] *Supra,* note 32.

[35] Wyld v. Lewis, 1 Atk. 432, 26 Eng. Reprint 276 (1738); Saltern v. Saltern, 2 Atk. 376, 26 Eng. Reprint 627 (1742); see 2 SIMES, LAW OF FUTURE INTERESTS, Chapter 21 (1936). The rule in England was eventually changed by statute. 1 Vict. c. 26 §29 (1837).

[36] Parish's Heirs v. Ferris, 6 Ohio St. 563 (1856); Briggs v. Hopkins, 103 Ohio St. 321, 132 N.E. 843 (1921).

[37] *Supra,* note 36.

[38] King v. Beck, 12 Ohio 390 (1843).

[39] In re Youtsey, 260 Fed. 423 at page 427 (D.C. 1916).

Another judge has said:

> Now, all that can be said on that subject [the presumption] is simply this, and this is what the judges who have spoken on that subject in Ohio say: That while language equally well conveys two different estates, that construction will be placed on it which will confer an estate in fee simple, in preference to an estate in tail. Section 4200, REV. STAT., only recognizes estates in tail. Then why argue there is anything in the policy of the law to discourage them, further than as I have stated.[40]

RIGHTS OF THE DONEE IN TAIL

The "first donee in tail", as the statute[41] describes B in a conveyance to "B and the heirs of his body," is held to own a fee tail estate in the land conveyed.[42]. Language in the early case of *Pollock v. Speidel*,[43] indicated that B in the above example would receive only a life estate, but the later cases have definitely determined B's estate as a fee tail. The distinction is important in that the owner of a fee tail estate is not liable for waste,[44] also the wife of the first donee may claim dower and the husband curtesy in land held in fee tail,[45] unless that right has been abolished by statute.[46]

B, as the first donee in tail, may transfer all or a part of the fee tail estate he holds. This power has been described, in a recent case,[47] as follows:

> The donee of the estate in fee tail preserved for the life time of the first taker only, has both the privilege and the power to create any interest in the land which could be created by a

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[40] Darling v. Hippel, 12 O.C.D. 754, at page 758 (1897). *Aff'd* without opinion, 60 Ohio St. 591, 54 N.E. 1103 (1899).

[41] OHIO REV. CODE §2131.08.

[42] Harkness v. Corning, 24 Ohio St. 416 (1873); Broadstone v. Brown, 24 Ohio St. 430 (1873); Dungan v. Kline, 81 Ohio St. 371, 90 N.E. 938 (1910).

[43] 17 Ohio St. 439.

[44] Hall v. Rohr, 10 Ohio Dec. Reprint 690, 23 Wkly. Law Bull. 121 (Common Pleas, 1890); Pollock v. Speidel, 17 Ohio St. 439, (1867); In re Jones' Estate, 44 Ohio L. Abs. 339, 64 N. E. 2d 609 (1946) dictum in the latter two cases). *Contra, Restatement,* PROPERTY §91 (1936).

[45] Harkness v. Corning, 24 Ohio St. 416 (1873); Broadstone v. Brown, 24 Ohio St. 430 (1873); Mays v. Mays, 5 Ohio L. Abs. 495 (1927).

[46] In Miller v. Miller, 83 N.E. 2d 254 (Common Pleas 1948) the court held dower could not be awarded the surviving spouse because of OHIO GEN. CODE §10502-1 (Now OHIO REV. CODE §2103.02). That statute provides that, in lieu of dower, the surviving spouse is entitled to take under the descent and distribution statute (OHIO REV. CODE §2105.05) her distributive share of all unencumbered lands held by the deceased consort at death. This case is critized, and the problem of the dower interest discussed in a comment, *Rights of a Surviving Spouse in a Fee Tail Estate in Ohio,* 18 U. CIN. REV. 332 (1949).

[47] Hoppes v. American National Red Cross, 128 N.E. 2d 851 (Common Pleas, 1955). The language is a verbatim quote from 1 HAUSSER, OHIO PRACTICE—REAL PROPERTY §451 (1952) which in turn is adopted from 1 *Restatement,* PROPERTY §89 (1936).

> person having an estate in fee simple absolute. However, any interest so created may be defeated, upon the death of the donee in tail, by the persons entitled after the donee under the limitation which created the estate.

Thus, there is no way for the first donee in tail, by a conveyance, to cut off the rights of his issue. Syllabus 3 of *Pollock v. Speidel*[48] reads as follows:

> The first donee in tail can not, in this state, by a sale and conveyance in fee simple, with convenants of warranty, bar the entail, or deprive his issue of the right of succession to the inheritance."

Clearly then, there is no method by which the first donee in tail can devise any interest in land so held.[49]

However, the first donee may apply to a common pleas court for a sale of the entailed estate, under the provision of OHIO REV. CODE, §5303.21 *et. seq.* The statute authorizes such action when the court is satisfied the sale:

> Would be for the benefit of the person holding the first and present estate, interest or use, and do no substantial injury to the heirs in tail, or others in expectancy, succession, reversion, or remainder.[50]

RIGHTS OF THE ISSUE OF THE FIRST DONEE

The statute[51] specifically provides that upon the death of the first donee, his issue take an "absolute estate in fee simple." This fee simple estate is vested in the issue of the first donee by withdrawing the reversion from the donor and his heirs, and annexing that reversion to the fee tail estate of the first donee, making a fee simple absolute in the issue of the first donee.[51] Although the issue of the donee in tail take by descent,[52] the tenant in tail is not the source of their title; they take, *per forman doni* from the person who first created the estate.[53]

The issue of the first donee must survive the first donee. For example, if land is conveyed to "B and the heirs of his body" and C, son of B, dies before B, C's heirs or assigns take nothing.[54] If there are no heirs of the body of the first donee, the land reverts to the original grantor in fee simple absolute,[55] if the grantor has not conveyed the reversion.[56]

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[48] 17 Ohio St. 439 (1867).

[49] 1 *Restatement,* PROPERTY §90 (1936).

[50] OHIO REV. CODE §5303.21.

[51] OHIO REV. CODE §2131.08.

[52] Richardson v. Cincinnati Union Stockyard Co. 8 Ohio N.P. 213, 11 Ohio Dec. 367 (Superior Ct. of Cin. 1901).

[53] Pollock v. Speidel, 17 Ohio St. 439 (1867).

[54] *Ibid.*

[55] Dungan v. Kline, 81 Ohio St. 371, 90 N.E. 938 (1910).

[56] Evangelical Lutheran St. Pauls Congregational Unaltered Augsbierian Confession v. Sheffield, 90 Ohio St. 467, 108 N.E. 1119 Memorandum decision, 1914).

An adopted child cannot qualify as an "issue of the first donee."[57] Ohio's adoption statute now specifically so provides, but even prior to the passage of that section, the courts held that an adopted child could not take land held in fee tail.[58] The court reasoned that the original grantor haad expressly directed who should take the property, and the first donee had no power to substitute his wishes for those of the original grantor.

A child of the first donee has no interest which he can transfer while the first donee is living.[59] He is considered only as an heir apparent or presumptive and the maxim *nemo esthaeres viventis*[60] applies.

If a child of the first donee purports to transfer his interest while the first donee is alive, and then survives the first donee, the child may be estopped from claiming his interest in the land conveyed.[61] For example, C is the son of B, who holds Blackacre under a deed reading "to B and the heirs of his body." While B is still alive, C, by warranty deed, assigns all his right, title and interest in Blackacre to X and his heirs. After the death of B, C would be estopped from claiming any interest in Blackacre.[62] If C had transferred his interest to X by quitclaim deed, he would not be estopped to claim Blackacre unless the deed asserted as a matter of fact that C was "seized or possessed of the particular estate which his deed purports to convey."[63]

Conclusion

It is no longer open to serious question that the fee tail, literally construed, is completely out of step with the modern concept of free alienability of land. By limiting the fee tail to one generation, Ohio has greatly reduced the period in which land can be tied up. But is it wise to stop halfway?

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[57] In Hoppes v. American National Red Cross, 128 N.E. 2d 851 (Common Pleas, 1955) A conveyed to "B and the heirs of his body." Several years later B reconveyed to A in fee simple. Later still, A re-conveyed to B in fee simple. The court held B was entitled to ownership in the land because no person entitled to contest the rights acquired by B (listed by the court as (1) the issue of the first donee in tail, (2) a remainderman named in the original fee tail conveyance, (3) a person holding an executory interest by virtue of the original conveyance, (4) the reversioner) was living at the death of B. A much simpler answer to this case would have been that the fee simple conveyance from A to B passed the reversion to B.

[58] Ohio Rev. Code, §3107. 13 (A) "Such adopted child shall not be capable of inheriting or succeeding to property expressly limited to the heirs of the body of the parents."

[59] Richardson v. Cincinnati Union Stockyard Co., 8 Ohio N.P. 213, 11 Ohio Dec. 367 (Superior Ct. of Cinn. 1901).

[60] Dungan v. Kline, 81 Ohio St. 371, 90 N.E. 938 (1910); Laver v. Kreiter, 7 Ohio App. 441 (1917).

[61] "No one is the heir of a living person." From Dungan v. Kline, *supra*, note 60, at page 385.

[62] Pollock v. Speidel, 27 Ohio St. 86 (1875).

[63] *Ibid.*

In the past, it was strongly argued that the fee tail was necessary to the preservation of landed aristocracy.[64] Few could accept such an argument today.[65] The only justification for the continued existence of the fee tail estate in Ohio is that it has been recognized by Ohio courts almost since the admission of Ohio to the Union. But age does not necessarily assure value. In this case, an antique of English law has become a burden in the modern administration of real property transactions.

Nearly half the states have abolished the fee tail estate by statute. Such action is recommended by the Commissioners on Uniform State Laws, in their Uniform Property Act.[66] Some states have reached that conclusion without benefit of legislation.

> In two states without express statutes, the courts have held that the fee tail becomes a fee simple. These decisions are, of course, commendable. The fee tail today has no serious support.[67]

Some of the problems under the Ohio fee tail statute have been discussed earlier in this comment. Not every possibility was discussed, but the material should indicate there are many pitfalls for the unwary. Although the proposition is not susceptible of proof, it is submitted that many fee tail estates are created simply because the drafter misapprehends the legal significance of the words "heirs of the body." If, on the other hand, the drafter of an instrument actually intends to create such interests as are now created by a transfer to "B and the heirs of his body", almost exactly the same result can be obtained by a transfer to "B for life, without impeachment for waste, remainder to the children of B living at B's death."

The time has come for Ohio to junk this relic of the past and enact a statute, similar to the Uniform Act, providing that all estates given in fee tail pass a fee simple to the grantee or devisee.

J. Richard Hamilton

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[64] Carter v. Grossnickle, 11 Ohio N.P. N.S. 465, 22 Ohio Dec. N.S. 680 (Common Pleas, 1911) Aff'd without opinion 88 Ohio St. 577, 106 N.E. 1059 (1913).

[65] See Morris, *Primogeniture and Entailed Estates,* 27 COLUM. L. REV. 24 (1927) for an analysis of the judicial and legislative reactions to the fee tail at different stages of American history.

[66] Uniform Property Act, §10 ". . . . The creation of fee tails is not permitted. The use in an otherwise effective conveyance of property, of language appropriate to create . . . . a fee tail, creates a fee simple in the person who would have taken . . . . a fee tail. Any future interest limited upon such an interest is a limitation upon the fee simple and its validity is determined accordingly. . . . ."

[67] NILES, THE LAW OF ESTATES SINCE BUTLER AND KENT, 3 Law: A Century of Progress 199 at 209 (1937). The states listed by Niles are Maryland: Posey's Leasee v. Budd, 21 Md. 477 (1863) and New Hampshire: Dennett v. Dennett, 40 N.H. 498 (1860); Merrill v. Am. Bapt. Mis. U., 73 N. H. 414, 62 Atl. 728 (1905).